

The Board placed this matter on the Summary Docket calendar for determination without oral argument.

ISSUES

1. What is the nature and extent of claimant's injuries resulting from the traumatic injuries on December 15, 2005? Claimant requests that the Board adopt the opinion of board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., that claimant suffered a 29 percent whole person functional impairment due to injuries suffered to claimant's right upper extremity, cervical spine, and right lower extremity. Respondent argues that claimant's impairment should be controlled by the opinions of Dr. Cusick and board certified orthopedic surgeon Pat D. Do, M.D., the treating physicians in this matter, that claimant suffered only a 5 percent functional impairment to his right upper extremity at the shoulder, or in the alternative that the Board adopt of the opinion of Dr. Huston that claimant suffered a 19 percent functional impairment of the right upper extremity at the level of the shoulder.
2. Did the ALJ err in calculating claimant's functional impairment? The ALJ awarded claimant a 10 percent functional impairment to the right upper extremity at the level of the shoulder for the surgeries performed on claimant, and a 10 percent impairment of the right upper extremity to claimant's arm for the resulting mild carpal tunnel syndrome, also resulting from the December 15, 2005, accident. However, the Kansas Court of Appeals issued its decision in *Mitchell*<sup>1</sup> on March 20, 2009, eleven days after the decision of the ALJ. The Board will follow the instructions of the Court of Appeals in calculating claimant's impairment at the highest level of the affected extremity.
3. Is respondent entitled to a credit for an overpayment of temporary total disability compensation (TTD) and temporary partial disability compensation (TPD)?

Respondent, in its brief to the Board, raises the issue of a child support obligation for claimant in the state of Washington. However, this issue was not presented to nor determined by the ALJ in the Award. The Board will not address the issue of child support in this award.

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<sup>1</sup> *Mitchell v. Petsmart, Inc.*, 41 Kan. App. 2d 523, 203 P.3d 76 (2009).

**FINDINGS OF FACT**

Claimant had been an employee of respondent for about 6 and a half years when, on December 15, 2005, he was helping another employee attach a thumb to a backhoe. This device was used to pick up trees. While working, the thumb hung up in the bucket. When they moved the bucket, the thumb popped out of the bucket and struck claimant on his right side, throwing him between 12 and 18 feet. Claimant was transported by ambulance to the emergency room of Via Christi Regional Medical Center in Wichita, Kansas. The hospital took x-rays of claimant's chest, pelvis and right femur, with no fractures noted. A CT scan of the right leg was also negative.

Claimant's initial complaints were in his right knee, back and ribs on the right side. Later, he experienced pain in his right arm and shoulder. Dr. Cusick initially treated claimant's knee. An MRI showed no evidence of meniscal or cruciate ligament injury and claimant was diagnosed with patellofemoral chondromalacia of the knee. Claimant had no firm evidence of internal derangement of the knee and was referred to physical therapy for strength and range of motion exercises. The physical therapy proved helpful, and by February 14, 2006, claimant was reporting no complaints in the knee. Claimant's range of motion was normal, and he walked without any abnormality. On that date, he was released by Dr. Cusick to return to work with no restrictions for the knee.

When claimant began experiencing pain in his shoulder, he was referred to Bernard Hearon, M.D., for an examination on June 8, 2006. Claimant's shoulder was injected and an MRI was performed. The initial diagnosis was possible subacromial impingement syndrome and possible right shoulder SLAP lesion. Surgery was recommended and performed by Dr. Hearon on August 2, 2006. Claimant was then referred for physical therapy and returned to work in March 2007 with restrictions. Claimant returned to his regular job with respondent.

Claimant was referred to orthopedic surgeon C. Reiff Brown, M.D., on September 11, 2007, for a rating. However, claimant continued to experience symptoms, and Dr. Brown determined that claimant needed additional shoulder treatment. Claimant was then referred to Dr. Do. When Dr. Do first examined claimant on December 4, 2007, he diagnosed rotator cuff syndrome or possible biceps tendinitis. Claimant underwent an MRI arthrogram of the right shoulder which displayed fraying of the anterosuperior labrum with changes at the biceps labral attachment. Conservative care provided little benefit, and claimant discussed the possibility of an additional surgery with Dr. Do.

On January 14, 2008, claimant underwent a right shoulder arthroscopy with extensive debridement of the labrum and subacromial decompression. The surgery proved successful and by March 25, 2008, claimant was reporting full range of motion of the shoulder with a dramatic reduction in his shoulder pain. On April 17, 2008, claimant reported no popping in the shoulder and only occasional tingling. Shoulder range of motion

was full, and claimant was found to be at maximum medical improvement (MMI) on that date. Claimant was returned to work with the restriction that he limit his overhead reaching to only occasional, meaning one third of the time or less. Dr. Do rated claimant at 5 percent functional impairment to the right upper extremity at the level of the shoulder pursuant to the fourth edition of the *AMA Guides*.<sup>2</sup>

Claimant was referred by his attorney to Dr. Murati on June 2, 2008. Dr. Murati diagnosed claimant with thoracic sprain; right carpal tunnel syndrome; right ulnar cubital syndrome; myofascial pain syndrome in the right shoulder girdle extending into the cervical paraspinals; post surgical repair of the right shoulder; right shoulder strain; and right anterior cruciate laxity in the right leg; with all diagnoses being the result of the accident on December 15, 2005. Claimant was rated at 10 percent to his right upper extremity for the carpal tunnel syndrome, 10 percent for the ulnar cubital syndrome, 5 percent for the loss of range of motion, 10 percent for the subacromial decompression, for a 31 percent impairment of the upper extremity or 19 percent of the whole person. Claimant was rated at 5 percent of the whole person for the myofascial pain syndrome in the cervical paraspinals, 5 percent of the whole person for the myofascial pain syndrome in the thoracic paraspinals and 7 percent of the right lower extremity for the anterior cruciate laxity. All combined, claimant had a 29 percent whole person impairment, pursuant to the fourth edition of the *AMA Guides*.<sup>3</sup> The only restrictions placed on claimant by Dr. Murati were to work as tolerated and to use common sense.

Due to the disparity in the medical opinions in this record, claimant was referred by the ALJ to board certified orthopedic surgeon Joseph W. Huston, M.D., for an independent medical examination (IME) on August 26, 2008. The history of accident and resulting medical treatment provided to Dr. Huston was consistent with this record. Dr. Huston's examination of claimant's right knee found no swelling, discoloration or tenderness of the knee joint, femur or thigh muscles. Claimant had full range of motion of the knee with no crepitus or ligament instability. No functional impairment rating was provided by Dr. Huston for the knee. The right shoulder examination displayed no swelling with very good range of motion and no crepitus. The right elbow had a full range of motion with no tenderness. Claimant's right hand and wrist displayed decreased pinprick sensation in the median nerve distribution. But the Tinel's sign was not positive, grip strength was good bilaterally, extension and flexion of the wrist was normal, thumb to finger pinching was strong and there was no muscle atrophy. Claimant was rated at 10 percent of the right upper extremity at the shoulder for the surgery and 10 percent of the right upper extremity for the mild carpal tunnel syndrome, for a combined 19 percent upper

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<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>3</sup> *AMA Guides* (4th ed.).

extremity functional impairment from this accident, all pursuant to the fourth edition of the *AMA Guides*.<sup>4</sup>

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>5</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>6</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>7</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>8</sup>

Claimant seeks modification of his functional impairment as presented by Dr. Murati. However, claimant at no time sought, nor received, medical treatment for his neck or upper back. The ratings provided by Dr. Murati appear inflated, based on the medical documents contained in this record. Additionally, claimant was found to have no problems

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<sup>4</sup> *AMA Guides* (4th ed.).

<sup>5</sup> K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

<sup>6</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>7</sup> K.S.A. 2005 Supp. 44-501(a).

<sup>8</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

to his right knee by both Dr. Cusick, his treating physician, and Dr. Huston, the court appointed IME doctor. Claimant's range of motion was full without complaint, and no crepitus was found or permanency determined, except by claimant's hired expert, Dr. Murati. The Board finds the opinions of Dr. Cusick and Dr. Huston to be more persuasive. Claimant has failed to prove that he had any permanent impairment to the right lower extremity from this accident. The Award of the ALJ denying claimant any permanent impairment to the right knee is affirmed.

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>9</sup>

K.S.A. 44-510d(a) states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

...  
(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

The ALJ found the opinion of the court ordered IME doctor to be the most persuasive in this matter. Claimant displayed permanent impairment in both the right shoulder, following the surgeries, and the right forearm from the mild carpal tunnel syndrome. Dr. Huston rated claimant at 10 percent of the extremity for each condition, with a combined rating of 19 percent to the extremity. The Board finds Dr. Huston's opinion to be the most persuasive and affirms the findings of the ALJ in that regard. However, the Award of the ALJ was issued on March 9, 2009, with the Court of Appeals' decision in

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<sup>9</sup> K.S.A. 44-510e(a).

*Mitchell* being issued on March 20, 2009. The Court, in *Mitchell*, found the ratings should be combined when dealing with multiple injuries to a single extremity. The rating should be to the highest level of the scheduled extremity, in this case, the shoulder. The Award of the ALJ is modified to award claimant a 19 percent functional disability to the right upper extremity at the level of the shoulder for the injuries suffered on December 15, 2005.

Claimant provided no objection to nor argument against respondent's request for credit for an overpayment of TTD and TPD. Respondent is awarded a credit for any overpayment of TTD and TPD to claimant.

### CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 19 percent functional disability to the right upper extremity at the level of the shoulder, but affirmed in all other regards. Respondent is awarded a credit for the overpayment of TTD and TPD.

### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated March 9, 2009, should be, and is hereby, modified to award claimant a 19 percent functional disability to the right upper extremity at the level of the shoulder, but affirmed in all other regards.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Vincent R. Armstrong, and against the respondent, Bob Bergkamp Construction, Inc., and its insurance carrier, Travelers Indemnity Company of Connecticut, for an accidental injury which occurred on December 15, 2005, and based upon an average weekly wage of \$607.69.

Claimant is entitled to 26.86 weeks of temporary total disability compensation at the rate of \$405.15 per week or \$10,882.33, followed by 37.65 weeks permanent partial disability compensation at the rate of \$405.15 per week or \$15,253.90 for a 19 percent permanent partial functional disability to claimant's right upper extremity at the level of the shoulder, making a total award of \$26,136.23.

As of the date of this award, the entire amount is due and owing, and ordered paid in one lump sum less any amounts previously paid, including any overpayment of TTD and TPD.

IT IS SO ORDERED.

Dated this \_\_\_\_ day of August, 2009.

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BOARD MEMBER

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**DISSENT**

The percentage of permanent impairment for each separate scheduled injury should be calculated separately according to the weeks on the schedule in K.S.A. 44-510d. Claimant is entitled to a separate permanent partial disability award for each scheduled injury rather than combining the ratings for the forearm (CTS) and shoulder into the ratings for the shoulder, as the majority has done.<sup>10</sup>

Before the Court of Appeals' decision in *Mitchell*, a majority of the Board believed that separate scheduled injuries should be compensated separately. We now have seemingly conflicting opinions from different panels of the Court of Appeals. In the *Mitchell* case, the Court affirmed a 3-to-2 decision of the Board where the then majority of the Board awarded a single scheduled injury award where the separate scheduled injuries to an extremity were combined. But in the *Conrow* case, decided just one week earlier, the Court of Appeals affirmed a decision by the Board where the separate scheduled injuries received separate awards. Here, the majority follows the *Mitchell* case instead of the *Conrow* case because *Mitchell* was a published decision. However,

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<sup>10</sup> See *Conrow v. Globe Engineering Co. Inc.*, No. 99,718, unpublished Court of Appeals opinion filed March 13, 2009); *Redd v. Kansas Truck Center*, No. 1,020,892, 2008 WL 4149955 (Kan. WCAB Aug. 27, 2008); and *Wilson v. Brierton Engineering, Inc.*, No. 1,024,659, 2007 WL 2937770 (Kan. WCAB Sept. 28, 2007).



*Mitchell* did not expressly overrule *Conrow*. Rather, in each case the Court of Appeals simply approved the approach that had been followed by the majority of the Board. The undersigned would reconcile these two decisions by the Court of Appeals by interpreting them together to mean that either procedure is acceptable. In fact, the Court in *Mitchell* said “K.S.A. 44-510d **permits** compensation at the highest level of the scheduled injury . . . . (Emphasis added.)” The Court did not say that K.S.A. 44-510d requires that multiple scheduled injuries be combined. Therefore, the majority of the Board need not change just to follow *Mitchell*.

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BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant  
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge